IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

LEROY HAROLD G.,

Plaintiff,

v. Civil Action No. 5:20-CV-0298 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES: OF COUNSEL:

FOR PLAINTIFF

DOLSON LAW OFFICE
126 North Salina Street, Suite 3B
Syracuse, NY 13202

GREGORY P. FAIR, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
Boston, MA 02203

HUGH D. RAPPAPORT, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C.

§ 405(g), are cross-motions for judgment on the pleadings.[1] Oral argument was conducted in connection with those motions on May 12, 2021, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Plaintiff's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

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[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

David E. Peebles
U.S. Magistrate Judge

Dated: May 19, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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LEROY HAROLD G.,

Plaintiff,

vs. 5:20-CV-298

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
----------x

Transcript of a **Decision** held during a Telephone Conference on May 12, 2021, the HONORABLE DAVID E. PEEBLES, United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: LAW OFFICES OF STEVEN R. DOLSON
Attorneys at Law
126 North Salina Street, Suite 3B
Syracuse, New York 13202
BY: GREGORY P. FAIR, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION
Office of General Counsel
J.F.K. Federal Building
Room 625
Boston, Massachusetts 02203
BY: HUGH D. RAPPAPORT, ESQ.

Jodi L. Hibbard, RPR, CSR, CRR
Official United States Court Reporter
100 South Clinton Street
Syracuse, New York 13261-7367
(315) 234-8547

(The Court and all counsel present by telephone.)

THE COURT: Let me begin by thanking counsel for excellent presentations. This is an interesting case and I enjoyed hearing your arguments and reading your briefs.

Plaintiff commenced this action to challenge an adverse determination by the Commissioner of Social Security finding that he was not disabled at the relevant times and therefore ineligible for the benefits which he sought. The challenge is brought pursuant to 42 United States Code Section 405(g).

The background is as follows: Plaintiff was born in September of 1968 and is currently 52 years of age. He was 41 years old at the alleged onset of his disability on November 1, 2009. Plaintiff lives in Baldwinsville. He stands 5 foot, 9 inches in height and weighs approximately 190 pounds. He has at least two daughters, both of whom appear to have been -- have grown into adulthood. Plaintiff graduated from high school and was in regular classes during school. He has between one and two years of college education in computer science. That was through a VESID program. At page 68 during the hearing, plaintiff testified he had one year of college education; in his function report, he stated he had two years of college education. Plaintiff's left-handed. He has a driver's license.

Plaintiff stopped working on or about November 11, 2009. In his last 15 years, he was employed initially at Hechinger as a night stocker. He lost his job in the early 1990s due to a bankruptcy of that company. He then worked for Georgia Pacific as a forklift operator for approximately eight months in 1994 or 1995. He then went to work for Gaylord Brothers stocking shelves using a stand-up reach truck and a stand-up forklift and he was also on occasion a package handler. He worked at Gaylord from 1996 until he stopped working in 2009.

Physically, plaintiff suffers from headaches and neck pain attributed by him to a work-related injury in or about March of 2003. The injury began as what he describes as a crick in his neck. He was in and out of work from that date up until November 2009. On March 24, 2010, Dr. Ross Moquin performed an anterior discectomy with fusion, that is reported at pages 325 through 327 of the administrative transcript. Plaintiff initially reported relief from his pain after the surgery but then headaches and pain reportedly resumed.

Plaintiff underwent umbilical hernia surgery repair in July of 2017, and a second neck surgery, an anterior cervical fusion with cage, on October 11, 2017 performed by Dr. Richard Kelley and Dr. David Eng at Upstate.

The plaintiff has undergone over the years many

x-ray, CT scan, and magnetic resonance imaging or MRI testing.

On April 10, 2003, an x-ray of the cervical spine showed no thoracic or cervical fractures.

On May 6, 2003, a cervical spine CT showed only remarkable for a very slight concentric posterior bulging of the C4-C5 disk with no evidence of neural encroachment or impingement.

On May 4, 2010, a cervical x-ray, spine x-ray showed that the hardware installed during the surgery was intact.

On July 6, 2010, x-ray of plaintiff's cervical spine post fusion showed the metallic plate affixed to the anterior margins of C5, C6, and C7 vertebral bodies. There's some slight persistent widening of the anterior C2-C3 intervertebral disk space. There was marked limitation of flexion. Extension is also limited. There was no evidence of motion at the level of cervical spine fusions.

X-rays taken on August 13, 2010 showed the metallic plate that had been affixed and there appeared to be no change from the prior study. No evidence of vertebral body movement at the level of the fusion with flexion or extension. That's at page 414.

In or about February 2014, MRI testing was taken as reflected in notes from Dr. Ross Moquin's examination at

page 541 with no evidence of cord compression or exiting nerve root impingement. Normal cervical lordosis. No evidence of dynamic instability. The fusion appeared to be excellent and in place and no evidence of failure.

On August 26, 2015, cervical x-rays revealed the anterior cervical fusion at C5, C6, and C7 with no dynamic instability noted on flexion or extension views.

On February 8, 2012, it was noted that a metallic plate was affixed in an x-ray that was taken. The vertebral body alignment appears anatomic. There's limitation of both flexion and extension. No evidence of motion across the fused vertebral bodies.

MRI testing of the cervical spine on January 29, 2015 revealed stable appearance to the postsurgical changes with anterior fusion from C5 to C7. No recurrent or residual disk herniation and no evidence of spinal stenosis.

The plaintiff also suffers from a hip issue. He claims to suffer from fibromyalgia, a shoulder tear, and depression.

Plaintiff has had a myriad of medical providers over time including SOS, an orthopedic group. He underwent 10 visits with SOS between May of 2003 and February 2007. His primary provider is Dr. Michael Lax who he has been seeing since July of 2003. He has also seen -- been to two pain clinics, including CNY Spine and Pain Medicine where he

sees Dr. Martin Schaeffer and has since 2015. He has been to New York Spine and Wellness, including seeing Physician Assistant Carla Vavala. He has been to Upstate where he has seen Dr. David Eng who performed the second 2017 surgery. He has been to physical therapy, and he has seen Dr. Ross Moquin, a neurosurgeon, from December 1, 2009 on.

Plaintiff has been prescribed various medications including hydrocodone, oxycodone, Horizant, Lidocaine ointment, pantaprazole, gabapentin, and Mobic. He has also had radio frequency ablations and facet injections, more than five, and he has used a TENS unit.

In terms of activities of daily living, plaintiff is able to dress, bathe or shower, groom, does some cooking, does -- washes some dishes, has tried mowing his lawn, reads, plays games on his computer, and he socializes with his family. He is unable, however, due to his condition, to attend school events, he no longer does woodworking as a hobby, he does not do any house maintenance, and no longer bowls.

Procedurally, plaintiff applied for Title II benefits protectively on June 28, 2016, alleging an onset date of November 11, 2009. At pages 100 and 235 of the administrative transcript, he claims disability based on cervical disk disease, low and mid back pain, and severe headaches. He also claims a torn shoulder socket and

fibromyalgia.

A hearing was conducted on October 24, 2018 by Administrative Law Judge Jude Mulvey with a vocational expert to address plaintiff's claim for benefits. On December 4, 2018, ALJ Mulvey issued an unfavorable decision which became a final determination of the agency on January 29, 2020 when the Social Security Administration Appeals Council denied plaintiff's request for review. This action was commenced on March 17, 2020, and is timely.

In her decision, ALJ Mulvey applied the familiar five-step sequential test for determining disability. She first noted that plaintiff's insured status expired after December 31, 2015. She then determined at step one that plaintiff had not engaged in substantial gainful activity between the alleged onset date of November 11, 2009 and December 31, 2015.

At step two, she concluded that plaintiff does suffer, and did at the relevant times, from limitations that impose, or conditions I should say, that impose more than minimal limitations on his ability to perform basic work-related functions, including cervical spine degenerative disk disease and headaches.

At step three, ALJ Mulvey concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in

the Commissioner's regulations, specifically considering Listing 1.04.

ALJ Mulvey next concluded that notwithstanding his conditions, plaintiff nonetheless maintains the ability to perform light work with limitations that are related to his physical conditions.

Applying that residual functional capacity or RFC finding at step four, ALJ Mulvey concluded that plaintiff is incapable of performing his past relevant work and proceeded to step five where she noted correctly that the burden shifted to the Commissioner.

At step five, she first noted that if plaintiff was capable of performing a full range of light work, a finding of no disability would be required under the Medical-Vocational Guidelines that form the regulations or the Grids and specifically Grid Rule 202.21. Noting that the plaintiff had limitations that eroded the job base on which the Grids were predicated, she relied on the testimony of a vocational expert to conclude that plaintiff can perform work that is available in the national economy notwithstanding his limitations and indicated that three representative occupations that plaintiff was capable of performing included as a marker, a ticket seller, and a collator operator, and therefore found the plaintiff was not disabled at the relevant times.

As Commissioner correctly notes, the standard that the court must apply in this action is extremely deferential and very limited. The court must determine whether correct legal principles were applied and the resulting determination is supported by substantial evidence. As the Second Circuit noted in *Brault v. Social Security Administration Commissioner*, 683 F.3d 443, this is a highly deferential standard. It is more exacting than even the clearly erroneous standard that lawyers are familiar with. In *Brault*, the court noted that under the standard, if a fact is found by an administrative law judge, that fact can be rejected by the court only if a reasonable fact finder would have to conclude otherwise.

Plaintiff has raised two essential arguments. One is somewhat multifaceted. He argues that the administrative law judge failed to properly develop the record and that there were gaps resulting from that failure, and within argument one is also the contention that the residual functional capacity was not based on any medical source statement and that the ALJ essentially played doctor and interpreted raw medical data to fashion the residual functional capacity.

The second argument is that the administrative law judge failed to perform a function-by-function analysis before determining her residual functional capacity finding.

The second argument I will address first. I agree with the Commissioner that there is no per se requirement that the function-by -- failure to perform a function-by-function analysis before affixing an RFC requires remand. In this case, the administrative law judge began her RFC finding with a determination that plaintiff was capable of performing light work. Light work is defined under the regulations and specifically 20 C.F.R. Section 404.1567(b) and I think that that essentially satisfies the need to affix the functional limitations that the plaintiff experienced as a result of his conditions.

The first argument is somewhat more troublesome. We begin with the proposition that the determination of disability hinges in large part on the RFC finding which represents a finding of the range of tasks that the plaintiff is capable of performing notwithstanding his impairments. Ordinarily, an RFC represents a claimant's maximum ability to perform sustained work activities in an ordinary setting on a regular and continuing basis, meaning eight hours a day for five days a week or an equivalent schedule. *Tankisi v. Commissioner of Social Security*, 521 F.App'x 29 at 33 from the Second Circuit 2013. An RFC determination is informed by consideration of all of the relevant medical and other evidence, 20 C.F.R. Section 404.1545(a)(3), and of course the RFC finding, like everything that the Commissioner decides,

must be supported by substantial evidence.

In this case, the administrative law judge concluded that plaintiff, notwithstanding his limitations, is capable of performing light work as defined in the regulations, except he cannot climb ladders, ropes, or scaffolds. He can occasionally kneel, crawl, balance, crouch, and stoop. He should avoid moderate exposure to temperature extremes, humidity, vibrations, chemicals, moving machinery, and unprotected heights. He can tolerate no more than moderate levels of noise as defined in Appendix D of the *Selected Characteristics of Occupations*, 1993 edition. He should avoid work outside in bright sunlight or work with bright or flickering lights. He can perform frequent extension, flexion, and rotations of the neck. That appears at page 29 of the administrative transcript. Light work of course, as I indicated earlier, is defined by regulation and, among other things, involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. It also requires a good deal of walking or standing, or alternatively sitting, most of the time with some pushing and pulling of arm or leg controls.

The record contains several medical opinions. The regulations require that medical opinions, meaning opinions from acceptable medical sources under the regulations that were in effect at the time this case was decided, because it

involves a claim that was filed prior to March 2017, the former regulations apply. There is a special duty to weigh the opinions of a treating physician. Ordinarily, the opinion of a treating physician regarding the nature and severity of an impairment is entitled to considerable deference, provided that it is supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence. *Veino v. Barnhart*, 312 F.3d 578 at 588, Second Circuit 2002. Such opinions are not controlling, however, if they are contrary to other substantial evidence in the record, including the opinions of other medical experts. Where conflicts arise in the form of contradictory medical evidence, their resolution is properly entrusted to the Commissioner.

If an ALJ does not give controlling weight to a treating source's opinion, she must apply several factors, we refer to them here in the Second Circuit as *Burgess* factors, to determine what weight should be assigned to the opinion and must provide reasons for the weight given and the rejection of any opinion as controlling.

There are several medical opinions in the record in this case that relate to plaintiff's physical capabilities. Dr. Christopher Grammar, apparently a pain management specialist, examined the plaintiff for purposes of Workers' Compensation, plaintiff's Workers' Compensation claim and

gave an opinion on August 1, 2013. That appears at 460 to 465, and duplicated again at 466 to 471 of the administrative transcript. He concluded there was no limitations in plaintiff's physical capabilities except for his perceived disability at 464. That was discussed at page 33 of the administrative transcript by the administrative law judge and given some weight. The administrative law judge in determining the weight to be given noted that the sum of the records shows that the claimant had some greater limitations than those opined.

Dr. Raymond Fiorini issued an opinion on February 3, 2016. He was another examining Workers' Compensation consultant. That appears at 606 to 612. It does not contain any functional limitations, although it does state what plaintiff reports, that is that he can lift only eight pounds, stand for five minutes and sit for ten minutes. It's discussed at page 33 and given some weight. The one significant statement is that plaintiff's condition is likely to worsen over time.

Dr. Michael Lax, plaintiff's treating physician, gave several statements, most -- many of which were properly rejected as addressing in a matter reserved to the Commissioner. For example, on page 627, on February 3, 2010, he opined that the plaintiff is unable to work due to his neck symptoms. Again on April 14, 2010, at page 641, he is

unable to work in any capacity at this time. Those of course were properly rejected. Dr. Lax, however, gave an opinion in a medical source statement on July 13, 2018 that appears at pages 1706 to 1709 of the administrative transcript. It is extremely limiting. It states that plaintiff is capable of lifting occasionally and/or carrying less than 10 pounds and frequently less than 10 pounds, can stand and/or walk for less than two hours in an eight-hour workday. Those are inconsistent with the finding of light work. It states that plaintiff can never kneel. The RFC states that plaintiff can occasionally kneel. It states that plaintiff can never crawl. It states that plaintiff is unable to reach above the head without pain, and it states that plaintiff is unable to concentrate most days due to severe and chronic pain.

That, as the Commissioner notes, that opinion was not discussed by the administrative law judge. Significantly, of course, the opinion does not state whether it relates to the period prior to December 31, 2015, plaintiff's date of last insured status, although it is noted that plaintiff -- Dr. Lax has treated the plaintiff over time since July 2003.

There is also an opinion from someone that's at 37F or 1697 to 1700 dated June 26, 2018. It is signed by someone whose signature is illegible. The medical specialty is stated to be neurosurgery. It is, the signature is over a

line that states physician's signature, and it is extremely limiting, again stating plaintiff can lift and carry less than 10 pounds and stand in or walk less than two hours in an eight-hour workday, should never climb, balance, kneel, crouch, crawl, or stoop, can only occasionally reach. I note that there is no limitation on reaching in the RFC finding. So those, again, that was not discussed. It also does not specify whether it applies to the period prior to plaintiff's date of last insured status, and we don't know if it's from a treating source such as Dr. Ross Moquin, Dr. Eng, or Dr. Kelley, and as the Commissioner properly notes, if it is from Dr. Eng or Dr. Kelley, then it most likely does not apply to the relevant time period. If it's from Dr. Moquin, it may well apply to that period.

There is also an opinion from Advanced Nurse Practitioner Rosemary Klein given on July 13, 2011, it appears at 666 and 667. It states that plaintiff was unable to work at this time, headache but is available for work via VESID if this becomes available. That is an opinion that is properly reserved to the Commissioner and plaintiff -- as Commissioner notes, Nurse Klein is not an acceptable medical source under the regulations in effect at the time.

The duty to develop the record is an essential function of an administrative law judge. The regulations of the Commissioner require that the ALJ develop a claimant's

complete medical history for at least 12 months prior to the filing of an application for benefits and longer if necessary to reach an informed decision, 20 C.F.R. Section 416.912(d), and there is a corresponding regulation in the Section 404 section. This obligation exists regardless of whether the claimant is represented by counsel or a paralegal or instead is proceeding pro se in which the duty is even more acute or heightened. The duty of an ALJ to develop the record is particularly important when there are gaps in information from a claimant's treating physician. *Boswell v. Astrue*, number 09-CV-533 from 2010 WL 3825622, Northern District of New York, September 7, 2010, magistrate judge's report and recommendation adopted at 2010 WL 3825621 by then Chief Judge Norman A. Mordue on September 13, 2010.

In this case, I find multiple errors. First of all there's, there are gaps in the record that are wide enough to drive a truck through. It is incomprehensible to me that the administrative law judge failed to even discuss the opinion of a treating source such as Dr. Lax. That in and of itself is an error and the court is not -- does not properly weigh a medical opinion in the first instance. It is for the Commissioner to do that. I recognize the Commissioner's argument that it may be a check-box form entitled to less deference. Certainly there's a question as to the period for which it applies, but since Dr. Lax did treat the plaintiff

during the relevant time period, there should have been clarification on that issue. Dr. Lax should have been recontacted and asked whether these opinions applied prior to December 31, 2015.

There is also in my view a question of whether the author of the June 26, 2018 opinion should have been, should have been established. It's pretty clear it's from a physician, that the signature on page 1700 is over the line that states physician's signature, the specialty is neurosurgery. It could have been Dr. Moquin, in which case it could well have applied to the relevant time period. As I stated earlier, if it's from Dr. Eng and Dr. Kelley, it probably didn't, but I think there was a duty on the part of the ALJ to establish that and certainly to discuss this opinion and why it may have been rejected.

The -- I recognize the difficulty at this late date of establishing plaintiff's condition prior to the date of last insured status but I think at the very least filling these gaps and perhaps reaching out to an expert with interrogatories to review the medical records and give an opinion as to the plaintiff's status. And the issue here is also, so Dr. Grammar's opinion was given some weight but the ALJ stated there is -- there are more limitations than Dr. Grammar's opinion reflect, but we don't know how much more and we don't know how the administrative law judge

arrived at that without playing doctor and reviewing raw medical data. There really isn't anything in the treatment notes that I could find that would equate to what the court found in *Tankisi* where a treating source issued an opinion in notes as to the functional capabilities of the plaintiff.

So I think there are several errors in this case. I don't find any persuasive evidence of disability, but I do find error. I do find that the resulting determination, therefore, is not supported by substantial evidence. I would grant judgment on the pleadings to the plaintiff without a directed finding of disability and order the matter be remanded for further consideration.

Thank you both for excellent presentations. Hope you have a good day, and stay safe.

MR. FAIR: Thank you, your Honor.

(Proceedings Adjourned, 12:04 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 13th day of May, 2021.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter